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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellants,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court of Appeals

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL FOREST PRODUCTS ASSOCIATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The National Forest Products Association (''NFPA'') is a non-profit corporation founded to promote the conservation and renewal of forest resources and to improve forest utilization and forestry practices. It is a trade association which represents both individual member companies that manufacture solid wood products and regional forest products trade associations. One such regional trade association is the Western Wood Products Association which represents the owners of more than 3 million acres of privately owned commercial forest lands in the state of California where this action arose. NFPA's direct and indirect member companies account for some 45 percent of the wood and wood products sold annually in the United States and own approximately 30 million acres of commercial forest land.

NFPA also speaks on behalf of the private ''non-industrial'' forest landowners who own almost 300 million acres or 59 percent of the commercial forest land in the United States. ''Non-industrial'' forest landowners are those whose forested lands are capable of producing commercial forest products but who do not own manufacturing facilities. Characteristically, such landowners have small holdings — typically 40 acres — and manage their lands for a variety of purposes including recreation, aesthetics and conservation.

This brief is submitted by NFPA on behalf of appellant San Diego Gas & Electric Company (sometimes referred to as ''the landowner''). NFPA believes that the decision of the lower court, if allowed to stand, could, if applied in the context of forest land ownership, encourage overzealous land-use regulation of such areas and, consequently, deprive forest landowners of their property without the constitutionally requisite just compensation.

SUMMARY OF THE ARGUMENT

Application of the principles announced by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), leads to the conclusion that the City of San Diego's ("the city") regulatory actions, including "open space" designation of the landowner's parcel, zoning actions, and acquisition efforts, have completely frustrated the landowner's "investment-backed expectations" and have prohibited any reasonable beneficial use of the property. Accordingly, the city has taken the landowner's property within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution. Such a taking necessitates "just compensation," not mere judicial invalidation of the city's ordinances.

ARGUMENT

The City's Course of Conduct Constitutes a Taking of the Landowners' Property Within the Meaning of the Fifth and Fourteenth Amendments of the United States Constitution.

The appellant's brief and those of the other amici supporting appellants will present detailed discussions and analyses of the facts and applicable law and ably demonstrate that the California Court of Appeals erred and should be reversed. It would serve no useful purpose to present yet another detailed discussion of those matters. Instead, NFPA would underscore the significance of this Court's recent detailed analysis of the jurisprudence of taking in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and respectfully suggest that the application of those principles to this case compels the

conclusion that a compensable taking of property has, here, occurred. [1]

In *Penn Central*, this Court acknowledged that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124. Instead, "whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Id.* (citations omitted).

Nevertheless, this Court has identified two factors of "particular significance" in resolving the "essentially ad hoc, factual inquiries" involved in these cases. *Id.* First, the Court will look to "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* Second, the Court will look to the "character of the governmental action." *Id.*

With respect to the "character" criterion, although this Court has observed that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government," *Id.*, it has also stated that "we do not embrace the

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[1] Although this Court found, in *Penn Central*, that application of New York City's Landmarks Preservation Law to Penn Station did not constitute a "taking", NFPA shows, *infra*, that key differences between the New York law and San Diego's regulatory activities, as well as significant factual differences in the practical effects of such laws, as applied to the properties at issue, compel the conclusion that a "taking" has occured in the case at hand.

proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel.'' *Id.* at 123 n. 25.

Where, as here, physical control by the government is not necessary to secure the public use at issue, then physical control is not a very important factor in determining whether a taking has occurred. In the case at hand, the city engaged in its course of conduct to obtain the ''existence value'' of open space for its citizens and whatever aesthetic, social, or environmental benefits follow. Preservation of open space is easily accomplished without government occupation or control of a piece of property since it merely requires restrictive zoning and the related refusal to allow development as is evidenced here. In this circumstance, physical control is irrelevant, let alone dispositive of the ''taking'' question.

The true ''character'' of the city's action is better revealed by an examination of its effects on the landowner, discussed below, and by noting the city's abandoned acquisition efforts which preceded the series of regulatory actions at issue. The city cannot, now, be heard to say that its regulatory actions do not amount to a ''taking'' when it initially planned to acquire the landowner's property through condemnation proceedings and had initiated an unsuccessful bond issue to make that possible. The city's intentions from the very beginning of this transaction were acquisitive, as opposed to regulatory. The failure of the necessary bond issue cannot alter the underlying ''character of the governmental action.''

The more important inquiry, given the facts of this case, is whether ''the interference with appellant's property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain

[it].''' 438 U.S. at 136. This inquiry turns, in part, upon whether the regulatory actions at issue ''so frustrate distinct investment-backed expectations as to amount to a 'taking.''' *Id.* at 127.

The property at issue was acquired by the landowner in 1966 as an apparent future construction site for power generation facilities. A substantial portion of the property was then zoned for industrial purposes and would, therefore, have accommodated the landowner's underlying investment expectations. Finding of Fact Nos. 3, 6, Jurisdictional Statement Appendix A-2, A-3. The trial court below, found that prior to the city's regulatory actions ''the highest and best use of the property taken was for use as an industrial park and related buffer areas.'' *Id.* No. 27, A-7. The trial court also found that following the city's series of regulatory actions culminating in the designation of the landowners property as ''open space,'' ''*no* development could proceed on the property.'' [2] *Id.* Nos. 29 and 30, A-7, A-8 (emphasis added). On this record, then the purpose for which the landowner purchased the property at issue — ''the investment-backed expectations of the landowner'' — have been completely frustrated.

In addition, as a result of the city's actions, there appears to be no remaining beneficial use of this property which would allow the landowner to obtain ''a 'reasonable return' on its investment.'' 438 U.S. at 136. As the California trial court found, ''[in] light of the particular

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[2] This contrasts sharply with the situation in *Penn Central* where this Court upheld a New York City historic preservation law because, in part, New York City's refusal to permit construction of a 50 story office building above Penn Station did not, on that record, ''sugges[t] an intention to prohibit *any* construction above the Terminal.'' 438 U.S. at 137 (emphasis by the Court).

characteristics of the said property, there exists no practical beneficial or economic use of the said property designated as open space which is consistent with open space." Finding of Fact No. 30, Jurisdictional Statement Appendix A-8. Moreover, the trial court found that the entire property "is unmarketable in that no other person would be willing to purchase the property, and the property has at most a nominal fair market value." *Id.* No. 33.

The property cannot be farmed, no structure will be allowed, and it cannot be held for resale since it has no resale value. The only apparent remaining incident of property ownership enjoyed by the landowner is the privilege and responsibility of paying property taxes. Under these circumstances the city's actions have precluded any possibility of the landowner obtaining a reasonable return on its investment. This situation is in marked contrast to that in *Penn Central* where the land-use regulation there at issue not only permitted the landowner to continue the existing use of its land but, in addition, to obtain a reasonable return on its investment. 438 U.S. at 137.

Comparison of San Diego's regulatory actions with the New York City historic preservation law, considered in *Penn Central,* reveals another interesting circumstance: to whatever extent the Penn Central railroad was denied use of its developmental rights above its terminal, those rights were made transferable to other railroad parcels by specific provision of New York City law. *Id.* Accordingly, this Court concluded in, *Penn Central,* that the railroad's property rights had not there been abrogated since they were fully transferable to neighboring parcels. No such conclusion can be reached in connection with San Diego's land-use ordinances since they lack a "transfer" feature.

One final comparison between *Penn Central* and the case at hand is useful. In *Penn Central*, this Court emphasized that its "holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion." *Id.* at 138 n. 36. The Court then noted, with approval, New York City's concession at oral argument that "if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable,' appellants may obtain relief." *Id.*

Since appellant in this case cannot use its land for "its intended purposes" or in any other "gainful fashion," and since appellant's investment in this land is no longer "economically viable," NFPA urges this Court to conclude that the City of San Diego has "taken" the landowner's property within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution.

Once a "Taking" Has Been Found to Have Occurred, the United States Constitution Permits No Alternative But Monetary or Other Valuable Compensation in a Just Amount

The city contends, and the lower court has held, that "[u]nlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation." Rather, that individual must overturn the offensive regulation through litigation. *San Diego Gas & Electric Co. v. City of San Diego,* No. 16277, slip op. at 4 (Cal. Ct. App., June 26, 1979); Jurisdictional Statement Appendix G-4. The landowner disagrees.

At the risk of suggesting an apparently simplistic solution to a question involving fundamental constitutional

principles, NFPA, nonetheless, is pursuaded that one need look no further than the plain words of the Fifth Amendment to settle this matter: "[N]or shall private property be taken for public use, without just compensation." That phrase permits no other reading than that advanced by the landowner in this case. The Framers of the Constitution did not leave it to the City of San Diego or the California courts to fashion any other remedy. Although the California Court of Appeals may have determined that social and fiscal circumstances in that state make a different result desirable, that court is without authority to fashion such a remedy. Those localities, like San Diego, who would abuse fundamental constitutional principles of private property through adoption and application of unconstitutional zoning laws and regulations should not be allowed to choose the remedy available to the aggrieved landowner. The Framers of the Constitution wisely concluded over two centuries ago that governmental interference with citizens' enjoyment of private property rights was so serious a matter that it could not be remedied simply by subsequent restoration of such rights.

Although NFPA believes that this Court need go no further than the plain language of the Fifth Amendment, some examination of the practical implications of the lower court's "substitute remedy" might be useful. Restoration of complete enjoyment of one's property rights after protracted litigation can never compensate the aggrieved landowner for the loss of the use and benefit of his property during the period of litigation. So whether or not the landowner succeeds in setting aside an offensive land-use regulation, there will, under the "substitute remedy", always remain some period of time during which the landowner will have suffered a "taking", but for which no compensation will ever be available. Such property losses can extend over lengthy periods of time as evidenced by the four year course of litigation in this case.

In the context of forest management, such a delay in the exercise of certain incidents of property ownership can mean substantial permanent property loss. For example, assume *arguendo* that San Diego applied its open space ordinance to a forested area with the added restriction that commercial forest management practices, such as road construction and harvesting activities, were prohibited so as to preserve the area in a "natural" condition. Assume, too, that while the forest landowner was pursuing judicial remedies of the sort required by the lower court, the forest area is attacked by tree-destroying insects.

This latter assumption, unfortunately, is all too frequently the case during the course of forest land management. When it occurs, one common forestry practice is removal of the infested trees to contain the insect infestation. Such "salvage" operations require road construction to facilitate the removal of timber and the creation of sizable open areas surrounding the infested trees to act as a buffer against further spread of insect infestation.

But since the "salvage" harvest and the related road construction would affect the "natural" condition of the forest land, it would apparently be prohibited by the open space ordinance we have hypothesized. Yet, without the ability to protect forest land from insect attack through application of common silvicultural techniques, the forest landowner would have lost a sizable portion of his investment — without hope of future compensation — while he was litigating the propriety of this hypothetical "open space" ordinance.

There are additional reasons for avoiding the lower court's "substitute remedy". First, the California Court of Appeals incorrectly assumed that all landowners have the means to engage in protracted litigation with governmental

entities that have at their disposal publicly paid attorneys. Second, the lower court incorrectly concluded that the threat of judicial intervention is a sufficient check on a regulator's inclination to obtain, by zoning ordinance, what should be acquired by condemnation.

The lower court's denial of compensation even in the event of an unconstitutional exercise of police power affects *all* landowners in this country not just corporations of substantial means. The most common class of United States landowner is probably the residential property owner. Such individuals are of a variety of economic means. As a matter of intuition, it appears safe to conclude that most homeowners are not in a position to maintain protracted litigation against governmental entities that would engage in unconstitutional exercises of police power. But even if a particular landowner possessed the means to litigate, no principle of constitutional law, of which NFPA is aware, holds that a constitutional right may be withheld because a claimant is of substantial means.

The lower court's concern that land use planners would be inhibited in performing their duties should courts allow inverse condemnation proceedings is misplaced as it ignores the recent proliferation of federal, state, and local regulations in the face of numerous legal challenges. In NFPA's experience, government regulators have come to view the possibility of litigation as merely another hurdle to overcome during the ordinary course of regulation promulgation. By analogy, one need only look to the seemingly geometric growth of the number of *Federal Register* pages published every year to understand that the threat of litigation, even by large corporations of substantial means, does little to discourage regulatory excess. In short, the California Court of Appeals has stricken the balance on the wrong side. It is the individual landowner in these times of burgeoning government

regulation that needs protection from the regulator, not vice versa.

CONCLUSION

For the foregoing reasons, NFPA urges this Court to conclude that (1) the city's course of conduct constitutes a taking of the landowners property; and (2) that such takings require monetary or other valuable compensation. Accordingly, the ruling of the California Court of Appeals should be reversed.

Respectfully submitted,

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